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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~312.~~ 142

C. ADOLPH LOW, C. H. BALDWIN, SAMUEL HART, AND G. A. LOW, PLAINTIFFS IN ERROR,

VS.

ALEXANDER AUSTIN.

Tax on imports

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED DECEMBER 6, 1870.

Dec 16 1871

Jus Field

SUPREME COURT OF THE UNITED STATES.

No. 342.

C. ADOLPH LOW, C. H. BALDWIN, SAMUEL HART, AND G. A. LOW, PLAINTIFFS IN ERROR,

VS.

ALEXANDER AUSTIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the supreme court of the State of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, being the highest court of the said State in which a decision could be had in the said suit between C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low, plaintiffs, and Alexander Austin, defendant, wherein was drawn in question the validity of a statute of, and an authority exercised under, the said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, and wherein a right, title, privilege, and immunity is claimed by said parties plaintiff under the Constitution of the United States, and the decision was against the title, right, privilege, and immunity specially set up and claimed under such Constitution, a manifest error hath happened, to the great damage of the said parties plaintiff, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the district of Columbia, on the first Monday of December next, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 19th day of October, A. D. 1870, and of the independence of the United States the ninety-fifth.

[SEAL.] L. S. B. SAWYER,
Clerk U. S. Circuit Court, 9th Cir., Dist. of Cal.

The above writ of error is hereby allowed.

A. L. RHODES,
Chief Justice of the Sup. Court.

2 (Indorsed:) 2369. United States Supreme Court. C. Adolph Low et al., plaintiffs in error, vs. Alexander Austin. Original. Writ of error. Filed Oct. 20, 1870. Geo. Seckel.

3 Supreme Court of the United States.

Know all men by these presents, that we, C. Adolph Low, C. H. Baldwin, Samuel Hart, G. A. Low, N. G. Kittle, W'm F. Babcock, of the city and county of San Francisco, State of California, are held and firmly bound unto Alexander Austin in the sum of one thousand dollars, gold coin of the United States, to be paid to the said Alexander Austin, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly, by these presents, sealed with our seals and dated the 19th day of October, in the year of our Lord one thousand eight hundred and seventy.

4 Whereas the above-named C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low, partners under the firm-name of C. Adolph Low & Co., have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of California in that certain suit therein depending wherein the said C. Adolph Low & Co. were plaintiffs, and the said Alexander Austin was defendant.

Now, therefore, the condition of this obligation is such, that if the above-named C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. ADOLPHE LOW,
By his att'y-in-fact, GEO. A. LOW. [SEAL.]
C. H. BALDWIN. [SEAL.]
SAMUEL HART. [SEAL.]
GEO. A. LOW. [SEAL.]
W. F. BABCOCK. [SEAL.]
N. G. KITTLE. [SEAL.]

Sealed and delivered in presence of—

Approved by me, this the 20th day of Oct., 1870.

A. L. RHODES,
Chief Justice of the Sup. Court, State of California.

5 (Indorsed:) In the Supreme Court of the United States. C. Adolph Low & Co., pl'ffs in error, vs. Alexander Austin, def't in error. Bond.

6 United States of America, ss, to Alexander Austin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at Washington on the first Monday of December, A. D. 1870, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Augustus L. Rhodes, chief justice of the supreme court of the State of California, this twentieth day of October, A. D. 1870, and of the independence of the United States the ninety-fifth.

A. L. RHODES.

7 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this 21st day of October, A. D. 1870, personally appeared Alex. P. Greene before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Alexander Austin, the party therein addressed, at said city and county, and on the day and date first above written.

ALEX'R P. GREENE.

Sworn to and subscribed before me this 21st day of October, A. D. 1870.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court, Dist. of California.

(Endorsed:) C. Adolph Low et als., pl'ffs in error, vs. Alexander Austin, def'd't in error. Citation. Filed October 20th, 1870. Geo. Seckel, cl'k.

8 In the supreme court of the State of California.

TRANSCRIPT ON APPEAL.

In the district court of the fifteenth judicial district, of the State of California, in and for the city and county of San Francisco.

C. ADOLPH LOW & CO., PLAINTIFFS,
vs.
ALEXANDER AUSTIN, DEFENDANT.

Statement on appeal.

This cause came on regularly for trial on the 2d day of February, A. D. 1870, Messrs. Hambleton and Gordon appearing as the attorneys of plaintiffs, and H. H. Byrne, esq., district attorney, for the defendant.

The complaint, prima facie, discloses a good cause of action for money had and received by the defendant to the use of plaintiffs, and its substantial averments are incorporated in the agreed statement of facts hereinafter inserted.

9 The answer is in the usual form of a general denial, and sufficient to meet any issues raised by the complaint.

A trial by jury having been expressly waived by the respective parties, thereupon the cause was tried before, and submitted to, the said court for its decision, sitting without a jury, upon a written statement of facts, agreed to by the respective parties, in the following words and figures:

[Title of court and cause.]

"*Agreed statement of facts.*"

That the plaintiffs named in the complaint have been for several years last past, and still are, co-partners, doing business, under the firm-name and style of C. Adolph Low & Co., at the said city and county of San Francisco, as importing, shipping, and commission merchants.

That the assessor of the said city and county of San Francisco, between the second Monday in March and the first Monday in August of the year A. D. 1868, proceeded to estimate and value all the personal property of plaintiffs, as such co-partners, in said city and county, for the fiscal year 1868–'69, as returned to him by their statement under oath, and entered the same according to said estimate of the assessor aforesaid.

That the said assessor, at the same time, on his own motion, in the said assessment roll, did also list and put down to the said plaintiffs, by their said partnership name, under the classification of personal property, certain goods, wares, and merchandise, consisting of champagne wine, in cases, and described them as "consigned goods," 10
and assessed the value thereof at the sum of $10,000.

That the total rate of taxation for said fiscal year, for State, city, and county purposes, is $3 05 upon each $100 of valuation.

That the defendant still is, and has been since the 7th day of December, A. D. 1868, the duly elected, qualified, and acting tax collector for the said city and county of San Francisco.

That the plaintiffs, as co-partners aforesaid, during all of the year A. D. 1868, and during all the times hereinafter mentioned, were the holders of, and in the actual possession, at the said city and county, of those certain goods, wares and merchandise, consisting of champagne wine, in cases, and which were listed and assessed by the assessor aforesaid, under the description of "consigned goods."

That the then cash value of said goods was the sum of ten thousand dollars.

That the same were held, possessed, and controlled by plaintiffs, as agents of one Gustave Gibert, of Rheims, in the Empire of France, and subject to his order.

That said goods had, just prior to their said possession by plaintiffs, been imported from France into the port of San Francisco, in the State of California, by the said Gibert, consigned to plaintiffs.

That after all custom-house duties and charges thereon had
11 been paid, the said goods were stored by the plaintiffs in their
warehouse, at the said city and county, in the original packages in which they had been so imported, and that during all the times hereinafter mentioned, the same remained unsold and in such original bulk. That the said tax collector had notice of the foregoing facts prior to his acts hereinafter recited.

That after the said tax-list and assessment-roll had been delivered to the said defendant, as tax collector, and after the taxes levied upon said goods had become delinquent, to wit, the sum of $305 00, and the cost and charges thereon accrued, amounting to the sum of $55, the said defendant proceeded to give the notice and take the means required by law to collect the same.

That the plaintiffs, having failed and refused to pay the said tax so assessed as aforesaid, the defendant, as such tax collector, thereupon proceeded to levy and collect the same by distress and sale of the goods and chattels of the said plaintiff and to that end, at the city and county of San Francisco, on the day of August, A. D. 1869, in pursuance of the statute in such case made and provided, he did levy and destrain upon sufficient of said goods, consisting of champagne wine, in cases, to satisfy the said tax, and all costs and charges, and proceeded to sell the same.

That the said plaintiffs thereupon paid to the said defendant, as such
tax collector, under protest in writing, the amount of said tax,
12 costs, and charges, to wit, the sum of $360, in gold coin of the
United States, in order to release their said goods from the said seizure and sale.

That plaintiffs, also, in writing, notified defendant, as such tax collector, not to pay over said sum of money, or any part thereof, as they were about to contest the validity of such tax.

That the defendant still holds the sum of $360, in gold coin of the United States, in his own possession, and, although demand therefor has been made by plaintiffs, refuses to return the same, or any part thereof.

That if the said tax be legal and valid, the said defendant, as tax collector, rightfully retains the said sum of $360 from plaintiffs, and all his proceedings have been regular and lawful.

That if the said tax be illegal and invalid, the said defendant holds the amount thereof as money had and received to the use of plaintiffs.

It is hereby stipulated that the above-entitled cause be tried and submitted upon the foregoing statement of facts heretofore agreed to by us.

Dated January 31st, A. D. 1870.

HAMBLETON & GORDON,
Att'ys for Plaintiffs.
HENRY H. BYRNE,
Dist Att'y.

The court, having reserved its decision for consideration, after due deliberation thereon, delivered its finding and decision on the 11th day of February, A. D. 1870, in favor of plaintiffs, against the said defendant, for the sum of $360.

13 The foregoing statement has been agreed to by us, and is correct, and we hereby stipulate that the same may be used and stand as the statement on appeal.

Dated March 3d, A. D. 1870.

HAMBLETON & GORDON,
Att'ys for Plaintiffs.
H H. BYRNE,
Dist. Att'y, Att'y for Def't.

(Endorsed:) Filed March 3d, 1870. John Hanna, clerk, by R. S. McKee, D. C.

[Title of court and cause.]

From the facts admitted by the agreed statement, on which this case was submitted, the defendant, as tax collector, was not authorized to sell, or the assessor of the city and county to assess, the property described in the complaint, the State law under which both these officers undertook to act being in contravention of sections eight and ten of article one of the Constitution of the United States. (People v. Maring, 40 New York, 374.)

Therefore the defendant had no right to receive from the plaintiffs the sum paid herein by them under protest. Judgment for plaintiffs for $360 in gold coin.

DWINELLE, *Judge.*

(Endorsed:) Filed February 11th, 1870. John Hanna, clerk, by R. S. McKee, D. C.

14 *Judgment.*

[Title of court and cause.]

This cause having been submitted by the stipulation of the respective parties hereto, upon an agreed statement of facts, on the 2d day of February, A. D. 1870, for the decision of the court, a jury having been waived, and the court been fully advised in the premises, now, on this 11th day of February, A. D. 1870, it is ordered and adjudged that the plaintiffs, C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low, do have and recover of and from the defendant, Alexander Austin, the sum of three hundred and sixty dollars in gold coin of the United States, and their costs of suit taxed at dollars.

Judgment recorded February 16th, 1870, ("B," page 458.)

Notice of appeal.

[Title of court and cause.]

You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of this State from the judgment made and rendered on the 11th day of February, A. D. 1870, in favor of the plaintiffs in said action, and against this defendant, and from the whole thereof.

Dated March 3d, A. D. 1870.

H. H. BYRNE,
Dist. Att'y, for Def't.

To the CLERK of the said district court, and
HAMBLETON & GORDON, *Atty's for Plaintiffs.*

(Endorsed:) "Notice of appeal."

15 Due service of the within, by copy, acknowledged this 3d day of March, A. D. 1870.

HAMBLETON & GORDON,
Att'ys for Plaintiffs.

Filed March 3d, 1870.

JOHN HANNA, *Clerk,*
By R. S. McKEE, *D. C.*

Stipulation.

[Title of court and cause.]

We hereby stipulate that the above and foregoing is a full and correct statement, on appeal, in the above-entitled case; that appellant need not insert more of the judgment-roll in said case than is contained herein, and that assignments of error may be first made upon briefs in the supreme court.

It is further agreed that, on the 3d day of March, A. D. 1870, the defendant in the above case filed notice of appeal to the supreme court, and on the same day served on plaintiffs' attorneys a copy thereof, and on the same day filed an appeal bond in due form of law, sufficient to render said appeal effectual, and to stay proceedings pending the appeal.

And it is further agreed that the insertion of said papers, and of the pleadings in this transcript, is hereby waived.

HAMBLETON & GORDON,
Att'ys for Plaintiffs.
H. H. BYRNE,
Dist. Att'y, Att'y for Defendant.

16 In the Supreme Court of the State of California, October term, 1870.

C. ADOLPH LOW & CO., RESP'D'TS.
vs. } 2369.
ALEXANDER AUSTIN, APP'L'T.

October term, 1870.

Low vs. Austin [No. 2369.]—The plaintiffs are importing, shipping, and commission merchants at San Francisco, and in their capacity as commission merchants have in their hands for sale certain champagne wines, in cases. The wines are the property of Gustave Gibert, of Rheims, in France, by whom they were consigned to the plaintiffs, and subject to whose orders they are held.

The goods had, just prior to their possession by plaintiffs, been imported by Gibert; the custom-house duties and charges having been paid, they were stored by plaintiffs in their warehouse, in the original packages in which they were imported, and while in that condition, being still unsold, were assessed, by the assessor of the city and county of San Francisco, for State and county taxes. Upon seizure of goods being made by the tax collector, to enforce the payment of these taxes, they were paid under protest, and this suit is brought to recover the amount paid. The plaintiff had judgment, and defendant appeals. The tax was levied under the general revenue law of the State, and is an ad valorem tax upon all values in the State alike, and the only question presented is whether it is a tax upon imports within the meaning of the tenth section of the first article of the Constitution of the United States, the material portion of which reads as follows: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress."

The case of Brown vs. Maryland, (12 Wheat., 419,) is confidently relied upon by the respondent as having decided the question in his favor. In that case the court declared an act of the State of Maryland, requiring all persons who should sell imported goods by wholesale, bale, or package, to take out a license from the State, for which they were required to pay $50, in conflict with the provision of the Constitution of the United States above quoted, and also to that which confers upon Congress the power to regulate commerce. It was held that the license was a tax upon the articles imported; that it intercepted the goods before they had become mingled with the mass of the property of the State, and, therefore, it was a tax upon the goods as imports, and consequently within the constitutional inhibition.

It will be seen at a glance, from a mere statement of the two cases, that they do not rest upon the same principle. In this case no tax is levied upon imports; as such they are not subjected to any burden as a class, and we did not understand the case of Brown vs. Maryland as going to the extent of establishing that an ad valorem tax by the State upon the property of its citizens would be in conflict with this provision, even though a portion of such values were invested in imported goods still in the original packages and unsold. This was the understanding of that case entertained by Chief Justice Taney, who argued the case for the State of Maryland. In the license cases (5 Howard, 575,) speaking of this decision, he says: "I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer, as well as other dealers, to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly, I at that time persuaded myself that I was right, and thought the decision of the Court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other and preventing collision between them. * * Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce and is not introduced into the general mass of property in the State. Nor, indeed, can it influence materially the price of the commodity to the consumer, since foreigners, as well as citizens of other States, who are not chargeable with the tax, may import goods into the same place and offer them for sale in the same market, and with whom the resident merchant necessarily enters into competition."

To the same effect is the language of Mr. Justice McLean in Nathan vs. Louisiana (8 Howard, 73:)

"What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from State taxation because they may be thus used? Is a tax upon a ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship-building the same as the exercise of any other mechanical art, and also the traffic of ship-chandlers and others who furnished the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the State, on the ground that the product sold may be used in commerce. No State can tax an export or an import, as such, except under the limitations of the Constitution."

In the case of State vs. North, (27 Mo., 464,) the Supreme Court held an act which imposed a discriminating tax upon imports after they had been sold by the importer, and after the packages in which they had been brought into the country *and* been broken, was in conflict with this provision of the Constitution.

The discussion in Brown vs. Maryland evidently has reference to a tax upon imports as such—that is, upon articles which have been imported as a distinctive class—and have no reference to such general property taxes as the State may impose upon all property within its borders, but discriminates neither in favor of or against any. This is the view taken of that case by the Supreme Court of this State in Lin Sing vs. Washburn (20 Cal., 534.) The question involved in that case was the right of the State to impose a license tax upon the Chinese. It was claimed that the tax was in conflict with that provision of the Constitution which empowers Congress to regulate commerce, and also with certain treaties and laws of Congress. Mr. Justice Cope, in the course of an able opinion, referring to the case of Brown vs. Maryland, says: "It was admitted that when the article had lost its character as an import, by being incorporated and mixed up with the mass of property in the country, it became subject, like other property, to the taxing power of the State. This admission, however, does not acknowledge the power of a State to single out an imported article and subject it to a tax not imposed upon other property of the same description; and such a tax would undoubtedly come within the principle of the decision. The whole reasoning of the decision shows that a discriminating tax, the effect of which would be to give preferences and close the markets against imported articles, would be invalid, and it is impossible that any circumstance could give validity to it. The court did not intend to distinguish between wholesale and retail dealers, nor between the importer and other persons purchasing the articles for the purposes of traffic, but to lay down a rule covering the whole ground of State interference. The free use of the powers vested in the Government was declared to be essential to its existence, and the intention was to lay down the rule broad enough to include every act of a State obstructing or impeding the constitutional measures of the Government. A State may tax the property of its citizens, but it cannot tax imports; and a tax discriminating against an imported article would be a tax upon the article as an import, and not as a part of the general mass of property."

In the case of Brown vs. Maryland it was contended on the part of the State that goods retained their distinct character as imports only while in transitu, and that, after they were once landed, they became incorporated with the mass of property constituting the wealth of the State, and were not imports, within the meaning of the constitutional inhibition. It was held, however, that the right to import implied the right to sell, that being in general the reason for importing, and also that the power of the United States to regulate commerce does not terminate at the boundaries of a State. That a tax imposed upon imported goods, after they have been landed within the State, would tend as effectually to prevent or restrict importations as would one imposed before they are landed, and such tax would, therefore, as effectually tend to defeat the object of the prohibition.

The Federal Government having no powers, except such as are grant-to it by special enumeration, and the States retaining all not granted or prohibited, the presumption must be in favor of the validity of the State law, until it is shown to be in conflict with some provision of the Constitution of the United States, or some law of Congress, or treaty made in pursuance of the powers granted.

It is admitted that the State may tax imported goods after they have become incorporated with the mass of the wealth of the State. It is contended that the property taxed in this case had not become incorporated with the mass of the general wealth of the State, simply because it was still the property of the importer, in the original packages in which it was imported.

We see nothing in this which even tends to show that the property had not become incorporated with the general wealth of the State. We see no reason why imported goods exposed in the store of a merchant for sale do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original packages or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the State, and upon every principle of equality should contribute to pay for their protection. Possibly the plaintiff, who is a commission merchant, has in his store champagne wines manufactured in Sonoma or Los Angeles, which he is offering to sell in the same market, in precisely similar packages. In what possible sense can one be said to constitute a portion of the wealth of the State in which the other does not? The object of the constitutional restriction is said to be to prevent the State from imposing a tax upon commerce, to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions by exempting foreign goods from its share of the cost of protecting it.

A tax which is imposed alike upon all the property of the State cannot in any sense be considered a tax upon commerce. It has no tendency to discourage importations. Exemption from the tax might encourage importations, but certainly it was not the purpose of the restriction to compel the State to offer a bounty to foreign produce over domestic. The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property.

But it is not true that the right of the States to tax imports depends upon the question whether they are still in the original packages in the hands of the importer or wholesale dealer or not, nor even whether they have become thoroughly incorporated with the general mass of property or not. It is said that a power which can impose a small tax may impose a large one, and therefore if there were no restriction the State could, through its power of taxation, prevent importations altogether. If the test as to whether the goods are imports or not, within the meaning of the restriction, be whether they are still in the hands of the importer or a wholesale dealer, in the original packages or not, then as soon as they have been sold or the packages broken it would follow that the State might impose any tax it might see fit. But a large tax upon the consumer of foreign goods would as effectually prevent importation as a tax upon the commodity in the hands of the importer. Many articles might not be taxed until after they had been in the hands of the consumer for years, as for instance, railroad iron, and then be subject to so high a tax as effectually to prevent all importations. There can be no donbt that such a tax would be declared void, otherwise the restriction can serve no purpose whatsoever. Any tax upon imported goods as a class, or which discriminates against them, is within the inhibition. On the other hand, all the wealth of the State, whether it be in imported goods in the hands of the importer, or in the original packages in which they were imported or not, are subject to the general ad valorem tax which is imposed alike upon all values within the State.

The judgment is reversed, and cause remanded, with directions to enter final judgment for the defendant.

TEMPLE, J.

We concur:

WALLACE, J.
CROCKETT, J.
SPRAGUE, J.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify, that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above-entitled cause, on the 12th day of October, A. D. 1870, and now on file in my office.

Witness my hand and the seal of the court, this 22nd day of October, A. D. 1870.

[SEAL.]

GEO. SECKEL, *Clerk.*
By B. A. MARDIS, *Dep'ty.*

17 In the supreme court of the State of California, October term, A. D. 1870.

C. ADOLPH LOW & CO., RE'P'D'TS,
vs.
ALEXANDER AUSTIN, APP'L'T.

On appeal from the district court of the 15th judicial district, in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Temple J. Wallace—Crockett & Sprague, j's, concurring—to the effect that the judgment of the court below be reversed and cause remanded, with directions to enter final judgment for the defendant.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment of the district court of the 15th judicial district, in and for the city and county of San Francisco, in the above-entitled cause be, and the same is hereby, reversed, with costs, and cause remanded, with directions to enter final judgment for the defendant.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 12th day of October, A. D. 1870, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this 22d day of October, A. D. 1870.

[SEAL.] GEO. SECKEL, *Clerk.*

18 In the supreme court of the State of California.

C. ADOLPH LOW & CO., PLAINTIFFS IN ERROR,
vs.
ALEXANDER AUSTIN, DEFENDANT IN ERROR.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify that the foregoing contains the original writ of error to the Supreme Court of the United States in the above-entitled cause, a copy whereof has been lodged in my office for the defendant in error, in pursuance of the statute in such case made and provided; the original bond in error, duly approved by Hon. A. L. Rhodes, chief justice of the supreme court of the State of California; copies of the original citation, and indorsements thereon; the transcript on appeal; the opinion of the court, and the judgment thereon.

Witness my hand and the seal of the court, affixed at my office in Sacramento, this 22nd day of October, 1870.

[SEAL.] GEO. SECKEL,
Clerk Supreme Court of California.

on commerce, to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions by exempting foreign goods from its share of the cost of protecting it.

A tax which is imposed alike upon all the property of the State cannot in any sense be considered a tax upon commerce. It has no tendency to discourage importations. Exemption from the tax might encourage importations, but certainly it was not the purpose of the restriction to compel the State to offer a bounty to foreign produce over domestic. The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property.

But it is not true that the right of the States to tax imports depends upon the question whether they are still in the original packages in the hands of the importer or wholesale dealer or not, nor even whether they have become thoroughly incorporated with the general mass of property or not. It is said that a power which can impose a small tax may impose a large one, and therefore if there were no restriction the State could, through its power of taxation, prevent importations altogether. If the test as to whether the goods are imports or not, within the meaning of the restriction, be whether they are still in the hands of the importer or a wholesale dealer, in the original packages or not, then as soon as they have been sold or the packages broken it would follow that the State might impose any tax it might see fit. But a large tax upon the consumer of foreign goods would as effectually prevent importation as a tax upon the commodity in the hands of the importer. Many articles might not be taxed until after they had been in the hands of the consumer for years, as for instance, railroad iron, and then be subject to so high a tax as effectually to prevent all importations. There can be no donbt that such a tax would be declared void, otherwise the restriction can serve no purpose whatsoever. Any tax upon imported goods as a class, or which discriminates against them, is within the inhibition. On the other hand, all the wealth of the State, whether it be in imported goods in the hands of the importer, or in the original packages in which they were imported or not, are subject to the general ad valorem tax which is imposed alike upon all values within the State.

The judgment is reversed, and cause remanded, with directions to enter final judgment for the defendant.

TEMPLE, J.

We concur:
WALLACE, J.
CROCKETT, J.
SPRAGUE, J.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify, that the preceding and annexed contains a true and correct copy of the original opinion delivered in the above-entitled cause, on the 12th day of October, A. D. 1870, and now on file in my office.

Witness my hand and the seal of the court, this 22nd day of October, A. D. 1870.

[SEAL.]

GEO. SECKEL, *Clerk.*
By B. A. MARDIS, *Dep'ty.*

17 In the supreme court of the State of California, October term, A. D. 1870.

C. ADOLPH LOW & CO., RE'P'D'TS,
vs.
ALEXANDER AUSTIN, APP'L'T.

On appeal from the district court of the 15th judicial district, in and for the city and county of San Francisco.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Temple J. Wallace—Crockett & Sprague, j's, concurring—to the effect that the judgment of the court below be reversed and cause remanded, with directions to enter final judgment for the defendant.

Whereupon, it is now considered, ordered, adjudged, and decreed by the court here, that the judgment of the district court of the 15th judicial district, in and for the city and county of San Francisco, in the above-entitled cause be, and the same is hereby, reversed, with costs, and cause remanded, with directions to enter final judgment for the defendant.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause, on the 12th day of October, A. D. 1870, and now remaining of record in my office.

Witness my hand and the seal of the court, affixed at my office this 22d day of October, A. D. 1870.

[SEAL.] GEO. SECKEL, *Clerk.*

18 In the supreme court of the State of California.

C. ADOLPH LOW & CO., PLAINTIFFS IN ERROR,
vs.
ALEXANDER AUSTIN, DEFENDANT IN ERROR.

I, George Seckel, clerk of the supreme court of the State of California, do hereby certify that the foregoing contains the original writ of error to the Supreme Court of the United States in the above-entitled cause, a copy whereof has been lodged in my office for the defendant in error, in pursuance of the statute in such case made and provided; the original bond in error, duly approved by Hon. A. L. Rhodes, chief justice of the supreme court of the State of California; copies of the original citation, and indorsements thereon; the transcript on appeal; the opinion of the court, and the judgment thereon.

Witness my hand and the seal of the court, affixed at my office in Sacramento, this 22nd day of October, 1870.

[SEAL.] GEO. SECKEL,
Clerk Supreme Court of California.

19 In the Supreme Court of the United States.—In error. Of December term, in the year of our Lord one thousand eight hundred & seventy.

C. Adolph Low, H. Baldwin, Samuel Hart, and G. A. Low, plaintiffs in error,
vs.
Alexander Austin, defendant in error.

Afterwards, to wit, on the first Monday of December, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said C. Adolp' Low, H. Baldwin, Samuel Hart, and G. A. Low, by William A. Fisher, their attorney, and say that in the record and proceedings aforesaid, there is manifest error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid given, was given for the said Alexander Austin, against the said C. Adolp' Low, H. Baldwin, Samuel Hart, and G. A. Low, whereas, by the law of the land, the said judgment ought to have been given for the said C. Adolph Low, H. Baldwin, Samuel Hart, and G. A. Low, against the said Alexander Austin; 20 and the said C. Adolp' Low, H. Baldwin, Samuel Hart, and G. A. Low, pray that the judgment aforesaid of the supreme court of the State of California, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of the said judgment, &c.

WILLIAM A. FISHER,
Attorney for Plaintiffs in Error, (Baltimore, Maryland.)

21 (Indorsed:) In the Supreme Court of the United States. C. Adolp' Low & others *vs.* Alexander Austin. No. 341.

Mr. Middleton,
Clerk of the Supreme Court of the United States:
Please enter my appearance & file this assignment of errors.

W'M A. FISHER,
Attorney for Plaintiffs in Error.

Filed 6 Dec., 1870.

(Indorsement on cover:) No. 342. C. Adolph Low, C. H. Baldwin, Samuel Hart, and G. A. Low, plaintiffs in error, *vs.* Alexander Austin. California sup. court. Filed 6th December, 1870.

IN THE

Supreme Court of the United States.

No. 342.

C. ADOLPH LOW, AND OTHERS, PLAINTIFFS IN ERROR,

vs.

ALEXANDER AUSTIN, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF FOR THE PLAINTIFFS IN ERROR.

IN THE

Supreme Court of the United States.

No. 342.

C. ADOLPH LOW, AND OTHERS, PLAINTIFFS IN ERROR,

vs.

ALEXANDER AUSTIN, DEFENDANT IN ERROR.

In Error to the Supreme Court of California.

BRIEF FOR THE PLAINTIFFS IN ERROR.

The Plaintiffs in Error are importing merchants of the City of San Francisco, and were during the years 1868 and 1869, in possession of certain champagne wines, which had been imported by them from France into the port of San Francisco, and remained in the original cases, in the warehouse of the Plaintiffs, all duties and custom house charges thereon having been paid.

Taxes were asssesed against the Plaintiffs in Error, on the said merchandise, by the Assessor of the City and County of San Francisco, under the general revenue law of California, which imposes taxation upon all values in the State alike. The Defendant in Error, a tax collector, levied upon the champagnes, and was about to sell them for the taxes, when the Plaintiffs in Error paid the amount under protest, and then instituted their action to recover the same from the Defendant, who still retains it in his possession. The District Court for the City and County of San Francisco, in which the action was instituted, rendered judgment for the Plaintiffs in Error, but, on appeal by the Defendant in Error, that judgment was reversed by the Supreme Court of California, and the case has been brought by Writ of Error, before this Court.

The position taken by the Plaintiffs in Error, is, that the attempt to subject the champagnes to the tax, is in violation of the restrictions of that clause of the 10th Section of the 1st article of the Constitution of the United States, which provides, that "no State shall, without the consent of the Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," and, if the attempt should be successful, it would trench upon the exclusive power of Congress, to "regulate commerce with foreign nations, and among the several States, and with Indian tribes," conferred upon it by the 8th section of said article.

The Plaintiffs in Error believe, that the controversy in this case is concluded by a number of decisions, already rendered in this Court,* but we will discuss briefly the grounds for the supposed distinction between the cases alluded to, and that now before the Court. The Judges of the Supreme Court of California concede, that the State can impose no tax upon the imported article, as such, while remaining in the original package in the possession of the importer for sale, but, contend, that imported goods, so situated, may be reached by taxation, under a tax, which is applicable to all values alike.

But, an examination of the reasons assigned by this Court, for the conclusions in the cases already mentioned, will clearly show, that goods so situated are not only protected from discriminating taxation, but from any taxation whatever by the State. In Brown *vs.* Maryland, it was held that the importer, by payment of duties, *purchased* the right to sell, and that the good faith of the government required that he should be protected in that right, without burden upon its exercise, or on the goods themselves, by the State; and that it was indispensible to the full and beneficial exercise by Congress of its power to collect imposts, that the imported article should be protected from State taxation, until "it has become incorporated, and mixed up with the mass of the property of the country." It does not become so incorporated so long as it remains in the possession of the importer, in the original packages for sale.†

"The sovereignty of a State extends to everything which exists by its authority, or is introduced by its permission," and such are the limits of its taxing power.

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*Brown *vs.* State of Maryland, 12 Wheat., 419. The License Cases, 5 How. 504. Waring *vs.* The Mayor, 8 Wall, 110. Weston *vs.* City of Charleston, 2 Peters, 449. Bank of Commerce *vs.* New York, 2 Black, 629 and 630.

† 12 Wheat, 442. 5 How. 574. 8 Wallace, 122.

But the imported article is introduced, not by the authority and permission of the State, but of the United States, and it remains segregated from the mass of the property of the State until it has been sold or bulk has been broken by the importer. The conclusion is irresistible, that up to that period, it is exempt from State taxation. In construing the Constitution, as well as any other instrument, it is proper in the first instance "to take a view of the literal meaning of the words to be expounded."*

The literal meaning of the words of the 10th Section of the 1st Article of the Constitution lend no sanction to the views of the California Court; it is not a *discriminating* tax that is forbidden, but *any* impost or duty whatever.

Can the absence of power to impose a discriminating tax be admitted, without a concession that the State cannot tax at all?

The distinction asserted by the Court below rests upon the assumption of a limitation of the taxing power of the State; but if the power of taxation exists at all, it is without restriction and must be exercised at the will of those in whose hands it is placed.†

A critical examination of the cases already cited will show clearly that no such distinction was in the mind of the Court.

Judge Marshall said, in Brown *vs.* Maryland, "That while remaining the property of the importer, in his warehouse, in the original package, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."‡

Judge Taney said, "That no State, either by direct assessment, or by requiring a license from the importer, could impose *any burden* upon him, or the property imported, beyond what the law of Congress had itself imposed."‖

In the License Cases, Judge Daniel did not assent to the conclusions of the Court, and expressed his dissent, almost in the form of an indignant protest, and it certainly cannot be conceived that he stated inaccurately the grounds of difference between himself and the other Judges. He says that the doctrines maintained by the other Judges, as the result of the decision in the case of Brown *vs.* Maryland, are that "the property imported shall never become subject to taxation, in common with other property of the same citizen, whilst it remain in the form in which it was imported, nor until it shall have been broken up and mingled with the general mass of property."§

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* 12 Wheat. 437.

† 12 Wheat. 439. 2 Black. 630.

‡ 12 Wheat. 442.

‖ 5 How. 574.

§ 5 How. 612.

In Waring *vs.* The Mayor, the tax was one which was general and to no extent discriminated against the imported goods, but it does not seem to have occurred either to the Court or the Counsel that this was a circumstance to be observed upon.*

In the case of the Bank of Commerce *vs.* Commissioners of Tax for New York City, the distinction, raised in the opinion of the California Court, was relied upon, as distinguishing that case from Weston *vs.* Charleston, (2 Peters, 449,) but its soundness was denied, and the reasoning of Judge Nelson is conclusive of the present controversy.†

The distinction is raised upon the theory that there can be no danger of the destruction of, or the serious diminution of the value of the import by the State taxation, because all other property is taxed to the same extent; but the power to tax does not depend upon the *degree* of its exercise, and although there may be no danger of serious diminution of the value of the import by unequal taxation, there is the certainty of *some* loss from *any* taxation.

The California Court has relied upon some expressions of Judge Taney in the License Cases as supporting the view that the imported article may be taxed while yet unbroken, in common with other property of the importer; but, while the passage relied upon, separated from the context, may be misunderstood, it is quite apparent, on reading the entire opinion, that Judge Taney had reference to the article when bulk had been broken by the importer, and his language in another part of the same judgment may be well applied, that it is unsafe to look "to detatched passages in the opinions, where general expressions are sometimes used, which, taken by themselves, are susceptible of a construction that the Court never intended should be given them, and which, in some instances, would render different portions of the opinion inconsistent with each other."‡

It is respectfully submitted, that the Judgment was erroneous.

WILLIAM A. FISHER,
CHARLES MARSHALL,
of Counsel for Plaintiffs in Error.

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* 8 Wall. 110.
† 2 Wallace, 629-631.
‡ 5 How. 573.

No.

IN THE SUPREME COUR
OF THE
UNITED STATES.

C. ADOLPHE LOW & CO.,
Plaintiffs in Error.

vs.

ALEXANDER AUSTIN,
Defendant in Error

Brief for Plaintiffs in Error.

HALL McALLISTER,
of Counsel for Plaintiffs in Error

IN THE SUPREME COURT

OF THE

UNITED STATES.

C. ADOLPHE LOW & CO.,
Plaintiffs in Error,
vs.
ALEXANDER AUSTIN,
Defendant in Error.

STATEMENT OF THE CASE.

C. Adolphe Low & Co. are importing, shipping and commission merchants, doing business in the City of San Francisco, State of California. They are the agents and consignees of Gustave Gibert, of Rheims, in the Empire of France, of whom they received, upon consignment, champagne wines of the value of ten thousand dollars. They paid all Custom House duties and charges upon these wines, and kept them in the original packages, in their warehouse, in San Francisco, for sale, subject to the order of Gibert. The wines were imported from France, and, as already stated, remained in the warehouse at San Francisco, in the original packages, when, under color of the laws of the State of California, they were assessed by the State authorities as the personal property of C. Adolphe Low & Co. The defendant in error, as Tax Collector of the City and County of San Francisco, had levied upon and was about to sell said wines for the amount of the alleged State tax remaining delinquent, when, to release them from seizure and sale therefor, the plaintiffs in error paid the amount of the tax and charges under protest to the defendant in error, Austin, as Tax Collector Thereupon the plaintiffs in error promptly instituted their action for money had and received, in the District Court of the Fifteenth Judicial District of the State of California, for the City and County of San Francisco, against the Tax Collector, Austin, for the recovery of the amount thus paid under protest. That Court, holding the State law, under which the tax was levied, void, rendered judgment in favor of the plaintiffs. From this judgment an appeal was taken to the Supreme Court of the State of California, where the judgment of the District Court was reversed, and the constitutionality of the State statute maintained. To this latter judgment the present writ of error is taken.

Of course, no question of mere regularity of the proceedings of the State officers arises here; they are conceded to have been all regular, provided these wines were, at the time and under the circumstances stated, subject to State taxation.

The question, therefore, for decision upon the present writ of error is—

Is imported merchandise, upon which all Custom House duties and charges have been paid, subject to State taxation, while remaining in the original packages, unsold, in the hands of the importer?

ARGUMENT.

The Constitution of the United States (Art. 1st, sec. 10,) provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and subdivision third of section eight of the same article declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

These clauses have frequently been presented to this Court for construction, and we deem the decisions thereon conclusive as to the want of power in the State, to levy the tax in question. A brief reference will show this.

In Brown *vs.* The State of Maryland, 12 Wheat. 419, the question arose whether the State of Maryland could compel importers to pay the State a license tax before selling their imported goods. The State Courts decided in the affirmative, but this Court, reversing their judgment, held that it could not. The exhaustive and luminous opinion delivered by Chief Justice Marshall covers the entire field, and leaves no room for discussion.

This Court there declare that "*a duty on imports, then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country.*"

12 Wheat., 437, 438.

"*No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer.*"

12 Wheat., 439.

"The Constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that *when the importer has so acted on the thing imported,* *that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."*

12 Wheat., 441, 442.

The Court furthermore held, that the importer by payment of the duties to the United States, purchases the right to dispose of his merchandise as well as to bring it into the country, and declared the State statute void for the reasons already stated, as well as for the reason that it was an interference with the power of Congress to regulate commerce.

This decision has never been overruled, but, on the contrary, has always been declared an authoritative exposition of the Constitution in regard to the points there considered. In the License cases, (5 How., 504,) the power of Congress to regulate commerce, and the authority of the States to interfere therewith, were very fully examined by this Court.

In the course of his opinion in that case, Chief Justice Taney says:

"It is unquestionably no easy task to mark by a certain and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates, and that of the State begins. The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the States, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution."

"This question came directly before the Court for the first time, in Brown *vs.* the State of Maryland, 12 Wheat. 419. And the Court there held that an article authorized by a law of Congress to be imported, continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no State, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the State, and might be taxed for State purposes, and the sale regulated by the State, like any other property. This, I understand, to be substantially the decision in Brown *vs.* the State of Maryland, drawing the line between foreign commerce, which is subject to the regulation of Congress, and internal or domestic commerce, which belongs to the State, and over which Congress can exercise no control."

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as the dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought that the decision of the Court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is, in some degree, vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. *Indeed, goods imported,* *while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.* The immense amount of foreign products used and consumed in this country are imported, landed and offered for sale in a few commercial cities, and a very small portion of them are intended or expected to be used in the State in which they are imported. A great (perhaps the greater) part imported, in some of the cities, is not owned or brought in by citizens of the State, but by citizens of other States, or foreigners. And while they are in the hands of the importer for sale, in the form and shape in which they were introduced, and in which they are intended to be sold, they may be regarded as merely *in transitu* and on their way to the distant cities, villages and country for which they are destined, and where they are expected to be used and consumed, and for the supply of which they were in truth imported. *And a tax upon them while in this condition, for State purposes, whether by direct assessment, or indirectly, by requiring a license to sell, would be hardly more justifiable in principle than a transit duty upon the merchandise when passing through a State. A tax in any shape upon imports is a tax upon the consumer, by enhancing the price of the commodity.* And if a State is permitted to levy it in any form, it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. *Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.*"

5 Howard, 574, 575, 576.

The other members of the Court who delivered opinions in the License Cases were equally explicit in their recognition of the principles declared in Brown *vs.* The State of Maryland ; and the principles announced in that case underlie all the discussions in the passenger cases.

7 How, 283.

In the People *vs.* Maring, 40 N. Y. (3 Keyes) 374; the power of the State to tax importers arose and was decided. After referring to the case of Brown *vs.* The State of Maryland, already cited, the New York Court say :

"There can be no doubt of the power of a State to tax articles which have been imported for sale, *after they have passed into the mass of general property*, by being sold by the importer either for consumption or resale, or by being divided by him into smaller quantities by the breaking up of the casks or packages in which they were imported, so as to destroy the character of import which subjected them to duties under the laws of the United States; but until the importer has so, by sale or otherwise, acted upon the articles as to cause them to lose their character of imports, a State tax upon them would be in direct violation of the constitutional prohibition; and a tax upon their sale, if it were possible to regard it otherwise than as a tax upon the article itself, would be in derogation of the right to sell, which is an inseparable incident of the law permitting importations, and which the importer acquired by payment of duties to the United States. Such a power in a State is incompatible with the power of Congress to regulate commerce, for it could be used to destroy it, by subjecting sales of imported articles to so high a tax as to absolutely prevent them."

3 Keyes, 375, 376.

The Court declared the statute of New York there in question void, for these reasons.

In Missouri, an act of the Legislature required merchants to pay an *ad valorem* tax, equal to that levied on real estate, upon all goods, wares and merchandise purchased by them, except such as might be the growth, produce, or manufacture of that State, and except such unmanufactured articles as might be the growth or produce of other States. The act contained numerous other provisions to secure the purpose of the statute. The constitutionality of that statute was passed upon in the case of the State *vs.* Shapleigh, 27 Mo., 344, where, after citing the case of Brown *vs.* The State of Maryland, 12 Wheat. 419, with approbation, the Court held, that under the authority of that case, the statute could not be construed to include imported merchandise, as it was not competent to the State to impose any tax upon it until after it had lost its distinctive character as an import.

See, also:

The State vs. *North*, 27 Mo. 464.
The State vs. *Robinson*, 49 Me. 285.

In the case of Waring *vs.* The Mayor, 8 Wall (U. S.) 122, after stating the principles decided in the case of Brown *vs.* The State of Maryland, 12 Wheat. 419, and approving them, this Court say: "Sales by the importer are held to be exempt from State taxation because the importer purchases, by the payment of the duty, a right to dispose of the merchandise as well as to bring it into the country, and because the tax, if it were held to be valid, would intercept the import, as an import, in the way to become incorporated with the general mass of property, and would deny it the privilege of becoming so incorporated until it should have contributed to the revenue of the State."

8 Wall., 122.

"When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this Court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer."

"*Importers selling the imported articles in the original packages are shielded from any such State tax*, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import."
8 Wall., 122, 123.

Thus, from 1827, when the case of Brown *vs.* The State of Maryland, 12 Wheat. 419, was decided, down to 1868, whenever the question has been presented, this Court has uniformly sustained the immunity alike of the *importer* and the *import* from State taxation, and scrupulously adhered to the line of demarcation originally announced as separating imports from the general mass of property confessedly subject to State taxation. Nor, with the single exception of the case under review, have we been able to discover an instance, in which any State Court has disregarded the authority of the leading case of Brown *vs.* The State of Maryland, to which reference has been already so often made.

Almy vs. *The State of California*, 24 How. (U. S.) 169.
Woodruff vs. *Parham*, 8 Wall (U. S.) 123.
Hinson vs. *Lott*, 8 Wall (U. S.) 148, 151.
Lin Sing vs. *Washburn*, 20 Cal. 534.
Brumagim vs. *Tillinghast*, 18 Cal. 265.
Garrison vs. *Tillinghast*, 18 Cal. 404.
Carson River Lumber Co. vs. *Patterson*, 33 Cal. 334.

With the principles thus established and uniformly maintained, the Supreme Court of California takes issue.

The learned Judge who prepared the opinion in this case, adverting to the distinction, laid down in the case of Brown *vs.* Maryland, between imports and the general mass of property subject to State taxation, says:

"We see nothing in this which even tends to show that the property had not become incorporated with the general wealth of the State. We see no reason why imported goods exposed in the store of a merchant for sale do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original packages or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the State, and upon every principle of equality should contribute to pay for their protection."

But the obvious answer is, that the importer did thus contribute when he paid the duties on his imports, and, if under the circumstances stated, the property became mixed up, and incorporated into the general mass of property of the State, it would be subject to State taxation in all the cases where, as we have seen, this and all other Courts have held that it was not so subject. The reasoning of the Court would not only do away with the distinction declared by this Court, but would establish the liability of all Federal securities to State taxation.

Bank of Commerce vs. *New York City*, 2 Black, 620.

There is no force in the suggestion, that the particular tax is no greater than that imposed upon all other taxable property; the question is not one of the fairness of the tax, but of the power of the State to tax at all.

Concede the power of the State to tax, and the extent of the tax immediately falls exclusively within the appropriate functions of State legislation. This Court has no power, nor is there any authority under the Constitution of the United States, to review the action of the State Legislature in imposing a tax upon property within its taxing power. As announced by this Court long since, "However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burthens; *and that portion must be determined by the Legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments.*"

Providence Bank vs. *Billings*, 4. Pet. 562.

All argument deduced from the uniformity or equality of the tax imposed upon imports with that levied upon the general property of the State, ceases to be of force, when it is borne in mind that, admitting the power of the State to tax, its authority to determine its amount or character is exclusive and supreme.

We apprehend no one would seriously contend in support of the judgment of a Court *without jurisdiction, that because it was a fair and equitable disposition of the cause, therefore, it was entitled to the respect and authority of the judgment of a Court of competent jurisdiction;* yet, with all deference to the learned Court whose judgment is under review, that, in effect, is all that the argument as to the fairness and equality of the tax legally amounts to. In truth, as has been repeatedly announced by this Court, there is no middle ground. Either the State has, or it has not, the power to tax. If it has the power, it may tax *ad libitum;* if it has not, then the equality or fairness of the tax is wholly immaterial.

That it has not the power is, we think, a point not open to doubt in this Court.

Nor is there, after all, any hardship or inequality in this. The importer pays for the immunity secured to him and his imports; it is a purely personal privilege, and ceases the moment he so acts in regard to the property as to mix it up with the general mass of property in the State. In paying duties, he contributes directly to the support of the Federal Government, and indirectly to the support of that of the State, and self interest will, as the importer imports to sell and not to hoard his imports, forever preclude all danger of their long remaining untaxable by State legislation. On the other hand, once concede the power of the State to tax imports, and instantly all the evils against which the Constitution was intended to guard, will inevitably ensue.

Nor will it answer to say that the tax is not upon imports or importers *as such*, that it is merely a general tax upon him, levied the same as upon every other citizen, in proportion to the assessed value of his property. This would only be doing the forbidden act in another form. The same argument would apply to a citizen holding federal securities exempt from State taxation; yet it has been repeatedly decided by this Court, that a party so circumstanced cannot thus be deprived of his immunity from State taxation. For all purposes of State taxation, imports, while retaining their distinctive character as such, must be treated as without the jurisdiction of the taxing power. The wines in this case come precisely within all the conditions which this Court have repeatedly declared secure immunity from State taxation.

We, therefore, respectfully submit, that the taxes in question were illegal, the judgment of the District Court correct, and that of the Supreme Court of California erroneous.

HALL McALLISTER,
Of Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

C. ADOLPHE LOW, ET AL.,

PLAINTIFFS,

VERSUS

ALEXANDER AUSTIN,

DEFENDANT.

BRIEF OF DEFENDANTS IN ERROR.

JO HAMILTON,

Attorney-General, State of California.

SACRAMENTO:
D. W. GELWICKS, STATE PRINTER.
1871.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. ADOLPHE LOW ET AL.,
Plaintiffs,
VS.
ALEXANDER AUSTIN,
Defendant.

BRIEF OF DEFENDANTS IN ERROR.

There is but one question in this case. It is this: Was the wine on which the tax was levied (having been imported and still in the original cases), on storage in the warehouse of the plaintiff in error, subject while there to the taxing power of the State of California, to the same extent, and no further, as other property?

To show that while there it was subject to taxation, for the purpose of raising revenue to support the State Government, the same as other property in the State, it is quite unnecessary to go beyond the conclusive argument contained in the able opinion delivered by the Supreme Court of California in this case, which seems to me to be exhaustive of the whole question; but I will call attention to the fact that the wine in question had passed beyond the protection of the laws of the United States when the tax was levied, and was exclusively under the protecting shield of the laws of the State; and I contend that the *right of taxation attached to the property in behalf of the State as soon as the exclusive duty of protecting it devolved upon the authorities of the State.* As it was under the sole protection of the laws of the State, it should bear its proportion of the burden necessary to a due administration of those laws. Suppose while the wine was in the warehouse of the plaintiff in San Francisco, a part or the whole of it had been stolen, under whose laws should or could the thief be pursued, prosecuted, and the property reclaimed? Not under the laws of the United States, but under the laws of the State. This is so obvious that a citation of authorities in support of the proposition would be a work of supererogation.

The State must pay the expense of *reclaiming* the property and prosecuting the thief, then why should not that property, in common with the other property in the State, be subject to taxation to raise revenue to defray that expense?

If imported property is not liable to be taxed under State authority as soon as it depends exclusively on State authority for protection against thieves and other wrong-doers, at what period of time or when do imported articles become subject to State taxation?

The Constitution makes no distinction between resident and non-resident importers; and suppose while on storage within the interior of the State, the warehouse should be broken into and the imported wine be taken by force from the importer and destroyed, in what Courts would he find redress, and under whose laws would relief be granted? If a non-resident, the Courts of the United States would have concurrent jurisdiction; but if a resident, the Courts of the State would have exclusive jurisdiction; but in both cases the measure of damages would be given under the laws of the State; or if not destroyed, but taken forcibly away, the right to recover would be secured by the laws of the State alone. Shall the State be required to protect the property of importing merchants stored in their warehouses, and be *denied* the right to tax it in their hands to support the State Government? Is this the meaning of the Constitution? If so, they may import and store wines of the value of millions of dollars, and increase their capital by the increased value of the wine which age gives it, and thus valuable property be withdrawn from the burden of Government while it is increasing in value; in fact, that is just this case. The record shows that the wines were consigned to the plaintiffs, and after all the Custom House duties and charges were paid the wines were stored by them in their warehouse, subject to the order of the consignor; and they had thus held them for more than a year, as the record shows, and how much longer does not appear. But if the meaning of the Constitution is, that while the wine remains in the cases in which they were imported they retain the character of imports, so as to prevent taxation, they might thus be held for twenty years or longer. But such is not the meaning of the Constitution. Could the importer be deprived of a constitutional right by changing the old cases? But if the argument is sound, that there is any magic power in the cases, as soon as the importer changes them he loses the right of exemption from taxation. For if while they are unchanged they give a right, when they are changed they take it away. The idea is absurd, and the point untenable. The test of the right of the State to tax is not whether the imported wines are in the original cases or have been sold at least once, but whether they have passed from under the protection of the laws of the United States as against all wrong-doers, and are under the exclusive protection of the authorities and laws of the State. They thus may be said to have been mingled with the general mass of property in the State, and all subject alike to taxation for the support of the State Government. And this doctrine is recognized in the case of Brown vs. The State of Maryland (12 Wheat., 419), relied upon by the counsel for the plaintiff in error. It is true the *precise* question now before the Court was not involved in that case, and it cannot be regarded as authority on either side, beyond such reasoning as may seem to be sound upon principle.

In speaking of that case, Chief Justice Taney, in the Passenger cases (7 How., 690), said: "Nor was there any question as to when the voyage terminated, as to the ship, or when passengers were entitled to land. The case turned altogether upon the right of the importer, the owner of imported goods; and the inquiry was, how long and under what circumstances they continued, after they had been actually landed, to be imports *or parts of commerce* subject to the control of Congress, and therefore exempt from taxation by the State; *and even with regard to the importer, that case did* NOT DECIDE *that he was not liable to be taxed for the amount of* *his capital employed in trade, though these imports were part of that capital.*"

I ask, why should not the imports be taxed as capital in trade, the same as other property? When the Constitution says that the State shall not tax imports beyond what is necessary to the execution of its inspection laws, it means that the State shall not levy that peculiar tax beyond that amount, and has exclusive reference to *impost duties*, which in the Constitution and the laws of the United States means "a duty on imported goods or merchandise," as stated by Bouvier (1 Bov. Dic., 688), and I may say that "imports or duties on imports" is a duty imposed upon imported goods as such for the privilege of landing and selling them alone, and so understood by the framers of the Constitution, as they allowed such tax so far and to the extent necessary for the administration of the inspection laws; but what has the inspection laws to do with the goods after they are stored in the warehouse of the consignee? Nothing. Therefore, they did not assume to prescribe any limitation upon the *ordinary* power of taxation after the goods had passed the Custom House and found their way into the warehouses of the consignees. The inspection laws may or may not be executed before the imported goods have passed the Custom House, but the prohibited tax, from the language in the Constitution in reference to it, clearly was such a tax as should be levied by discrimination, exclusively upon the imported articles as such, and it was not intended by the framers of that instrument to abridge the ordinary taxing power of the State after the imported articles had passed under the sole jurisdiction of the State.

The law which was declared unconstitutional in the case of The People vs. Maring (3 Keyes, N. Y. Rep., 374), imposed a discriminating duty upon the *sale* of imported wines, as such. This the Court said the State had not the right to do, and this is all the Court did say. But in this case the law only imposed an *ad valorem* tax upon all property in the State for the support of the State Government, the language of the Act being: "All property, of every kind, name and nature whatsoever, within this State, shall be subject to taxation." (Statutes 1867-8 of Cal., p. 674.) And the wine in question was assessed under the law to which the above was amendatory of the fourth section. The wine being found in the State, and having been therein for more than a year, on storage in a warehouse, had lost its character as an import, and was subject to taxation under that law the same as other property found in the State.

The case of Woodruff vs. Parham, decided at the January Term of this Court, 1870, and relied on by the counsel for plaintiff, if authority at all in this case, is in favor of the defendant, for there the principle seems to be recognized that the framers of the Constitution only intended to prohibit the States from levying such *discriminating* tax upon imports as would have the effect or tendency to *impede* or *obstruct* free importation, but that a tax levied upon all property equally in the State, whether imported or not, was not intended to be within the prohibition. This principle is not directly declared in that case, but the reasoning allows it. The question now before the Court has never been decided by this Court, and was not involved in any adjudicated case, but the following cases, in addition to those referred to in the opinion of the Supreme Court of California, bear upon the question now involved, and may throw some light upon it:

First—As to when the property is beyond the jurisdiction of the United States and within the exclusive jurisdiction of the State.

Waring vs. Clarke, 5 How., 441 ; also, 628.
Coolidge's case, 1 Wheat., 415.
Bevan's case, 3 Wheat., 336.
1 Woodbury vs. Minot, 401, 455, 481, 483.
2 Sumner, 419.

Second—When the property is within the jurisdiction of the State it may be taxed for the purpose of supporting the administration of the laws of the State, for the general good of all persons and property in the State.

Justice Woodbury's opinion in the Passenger cases, 7 How., 537, 539, and cases cited.

Howell vs. The State, 3 Gill, 15.

Cummings vs. The Mayor and Aldermen of Savannah, R. M. Charlton's Rep., 26.

Green vs. The Mayor, etc., Id., 368.

There can be no grave doubt that the wines had ceased to be imports within the meaning of the Constitution, and therefore subject to the State power of taxation, in common and to the same extent with other property, for ordinary purposes, and I confidently hope the Court will so declare the law to be.

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